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Summary of Argument.

I.

Under the Federal Employers' Liability Act, there must be a showing of actionable negligence on the part of defendant amounting to more than a mere scintilla before a cause may properly be submitted to the jury. In the case at bar, the evidence was insufficient to justify a finding that petitioners violated any duty which they owed to respondent. The Circuit Court of Appeals for the Eighth Circuit should, therefore, have reversed the case on the ground that there was no showing of actionable negligence 10

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1947.

No. .....

JOSEPH B. FLEMING AND AARON COLNON, TRUSTEES OF THE ESTATE OF THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, *Petitioners,*

vs.

EVERETT E. HUSTED, *Respondent.*

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Petitioners Joseph B. Fleming and Aaron Colnon, as Trustees of the Estate of The Chicago, Rock Island and Pacific Railway Company, respectfully show to this Honorable Court:

SUMMARY STATEMENT OF THE MATTER INVOLVED.

Respondent instituted this action under the Federal Employers' Liability Act in the United States District Court for the Southern District of Iowa against Petitioners (bankruptcy trustees for The Chicago, Rock Island and Pacific Railway Company) for the recovery of damages for personal injuries alleged to have been sustained by respond-

ent while employed by petitioners in the capacity of a freight train brakeman.

The evidence upon the trial disclosed that respondent, an experienced brakeman, having some twenty-three years of service with petitioners and their predecessor railway company, on June 23, 1943, was the rear brakeman on a freight train which was to operate from East Des Moines, Iowa, to Earlham, Iowa, thirty-two miles distant, and return (see R. 28-29). Respondent went to work about 11:30 A.M. The train had some 10 or 11 freight cars out of East Des Moines and picked up and set out cars at West Des Moines and Booneville (R. 13). The next station was Van Meter, a small town some twenty miles west of Des Moines. Respondent was instructed to procure the switch list from the station agent at Van Meter and to help the head end brakeman in the station work there (R. 12-13).

After leaving Booneville, respondent rode in an empty box car at the head end of the train. As the train neared Van Meter and slowed down to about two miles an hour, respondent sat down in the open doorway of the box car with his feet hanging out the car, preparing to alight on the platform in front of the Van Meter depot (R. 13). When the car reached a point about opposite the depot, respondent placed his weight on his hands and raised himself up. The Van Meter station platform is composed of brick with a cement curb next to the southerly rail of the main line, which is some six or seven inches wide (R. 13). Respondent identified Exhibits "A" (reproduced R. 15), "B" (reproduced R. 17), "C" (reproduced R. 19), and "D" (reproduced R. 21) as correctly showing the condition of the station platform at the time of his alleged injury. Petitioners' Exhibits 6 (reproduced R. 35), 7 (reproduced R. 37), 8 (reproduced R. 51), and 9 (reproduced R. 53) show conditions substantially identical with respondent's exhibits.

Respondent first described the manner of his alleged injury as follows:

> "And there was an awful surge of the train which threw me out, and I caught my foot in a crack in the curb there and slipped with my left foot, and it threw me and I lit on my left shoulder and side on the platform" (R. 13).

Respondent further said on direct examination that his foot was caught in the curb at the point where there was a break (R. 18). On cross examination, respondent testified:

> "I told Mr. Michel (respondent's counsel) the train was only going about two miles an hour when this thing happened. That would be only a little bit more than barely moving. I was used to getting on and off freight trains moving at considerably greater speeds than two miles an hour. There was a hard surge ahead at that time and back a little" (R. 30).

In reporting the occurrence of his alleged injury to the trainmaster's clerk at Des Moines, Iowa, on the day following his fall, respondent signed the following written statement:

> "I do not blame anyone for this accident. I simply slipped on the glazed brick platform as I got down from this car. The platform was dry and in normal condition." (See petitioners' Exhibit 1, reproduced R. 41 and 42).

Respondent also signed a medical report at about the same time, in which, in response to a question as to the manner in which his alleged injury occurred, stated:

> "While getting off a freight car slipped on brick platform, fell, and injure left shoulder, arm and left chest." (See petitioners' Exhibit 4, reproduced R. 47).

On September 23, 1943, respondent made a detailed report to petitioners' claim agent, in which he said:

> "As the train was coming to a stop at water tank at Van Meter and train still moving possibly two or three miles per hour, fireman had gotten off engine and was on the ground, I sat down in the doorway of the box car on the station platform side and with this car opposite the brick platform, towards the west end, with my hands on the floor of the box car I jumped out onto the platform and struck on the brick platform, and because of the slick condition of the bricks my feet slipped on platform, causing me to fall, striking on my left side, shoulder and arm" (R. 65).

Being recalled for further direct examination by his counsel, respondent testified:

> "I did not tell the claim agent that 'I jumped out onto the platform and struck on the brick platform and because of the slick condition of the bricks, my feet slipped on the platform.' I told him I was jerked out." (R. 71)

Respondent claimed to have suffered an injury to his spine as the result of his fall, and after being examined by numerous physicians in Des Moines, Iowa, Chicago, Illinois, and at several points in Texas, went to the Mayo Clinic at Rochester, Minnesota, where an operation was performed for the removal of a herniated disk between the fourth and fifth lumbar vertebrae on July 14, 1944.

There was no evidence that the broken portion of the platform curb was any higher than the unbroken portion. The distance from the southerly edge of the rail to the northerly edge of the curb was 25 inches at the point where the slab was displaced toward the rail, and 28¼ inches where the curb was upright in a vertical position (R. 79). The approximate overhang from the outside edge of the rail to the outside edge of a box car is 27½ inches (R. 79, R. 84, R. 86). Respondent alleged negligence on the part

of petitioners in two respects: (1) In failing to furnish respondent a reasonably safe place to work by reason of the broken, defective, and uneven condition of the platform curb; (2) in negligently operating the train so as to cause same to be jerked as respondent was about to jump from the freight car. The trial court, upon petitioners' motion, withdrew from the consideration of the jury the second specification of negligence predicated upon the alleged jerking of the train (R. 76), and submitted the case to the jury on the single allegation that petitioners were negligent in that they failed to provide respondent a reasonably safe place in which he could do his work "in that they kept, maintained, and allowed a certain platform at said station at Van Meter, Iowa, to be in a defective, dangerous, and uneven condition, and allowed depressions to remain therein" (R. 105). The jury returned a verdict of $13,056 for respondent (R. 116).

The Eighth Circuit Court of Appeals affirmed the trial court and held that jury issues were presented both upon the question of petitioners' negligence and upon the issue of proximate cause. The opinion is reported in 164 Fed. (2d) 65. With respect to the condition of the platform curb, the Court said:

> "But even if it could be declared that the platform was reasonably safe for such ordinary uses as walking, trucking and other general depot purposes (which we need not determine), it would not therefore follow that it also was reasonably safe for the more hazardous use as a facility in allowing trainmen to alight from moving cars. And the trustees' duty under the Federal Employers' Liability Act was to exercise reasonable care to try to make the platform generally safe for all the uses for which it was intended or permitted to be a facility in the course and scope of its employees' duties.
>
> Whether the defect in the curb (which had existed for several years) was such as was reasonably likely

to become a factor in causing an injury to an alighting trainman and so should have been corrected was a question that was within the province and competence of the jury to decide. Under the expressions and indications in the recent decisions of the Supreme Court, there is no right on the evidence to regard it as an absolute, which was entitled to be disposed of as a matter of law. See e. g. *Bailey v. Central Vermont Ry.*, 319 U.S. 350, 354, 63 S. Ct. 1062, 1064, 87 L. Ed. 1444; *Tennant v. Peoria & P. U. Ry. Co.*, 321 U.S. 29, 33, 64 S. Ct. 409, 411, 88 L. Ed. 520; *Lavender v. Kurn*, 327 U.S. 645, 66 S. Ct. 740, 90 L. Ed. 916. Cf. also *Chicago & N.W. R. Co. v. Grauel*, 8 Cir., 160 F. 2d 820. The earlier cases, such as *Delaware, L. & W. R. Co. v. Koske*, 279 U.S. 7, 49 S. Ct. 202, 73 L. Ed. 578, *Missouri Pac. R. Co. v. Aeby*, 275 U.S. 426, 48 S. Ct. 177, 72 L. Ed. 351, and *Nelson v. Southern Ry. Co.*, 246 U.S. 253, 38 S. Ct. 233, 62 L. Ed. 699, upon which the trustees rely, may not be read apart from these later decisions. Perhaps, also, the concept of negligence in the earlier cases and the court's admeasurement of the duty owed therein can be said to have contained some unconscious or other subtractings, from the interplay of the then-existing doctrine of assumption of risk.

What we have said as to the sufficiency of the evidence to constitute a jury question on negligence is controlling also of the trustees' argument that there was no basis for allowing the jury to decide whether the defect in the curb was the cause of plaintiff's fall and injury. Plaintiff's testimony was that he was sitting in the doorway of the front box car of the train, with his feet hanging out, holding the weight of his body on his hands, preparatory to jumping onto the station platform, when a jerk of the train caused him to be pulled forward out of the car. He did not undertake to claim on the evidence that the jerk was of a character that entitled him to rely on it as negligence, and it therefore was permitted to be treated as being only such a jerk as ordinarily would occur in the slowing down and stopping of any freight train.

The trustees say, however, that on this testimony it would have to be held that the non-negligent jerk of the train was the proximate cause of the accident. But this fails to take into account plaintiff's further testimony, to the effect that as he came in contact with

the platform he caught his foot in the break in the curb and was thrown down onto the brick surface. On this testimony, it clearly was for the jury to determine whether the break in the curb had caused or contributed to plaintiff's fall. Cf. *Tiller v. Atlantic Coast Line R. Co.*, 323 U.S. 574, 578, 579, 65 S. Ct. 421, 423, 89 L. Ed. 465; *Tennant v. Peoria & P. U. Ry. Co.*, 321 U.S. 29, 33, 34, 64 S. Ct. 409, 412, 88 L. Ed. 520. If the jury found that it had, then legally it was a proximate factor in the accident. The Federal Employers' Liability Act gives a right of recovery whether the negligence of the employer is in whole or only in part the cause of an employee's injury. 45 U.S.C.A. Sect. 54." (R. 135, R. 136, R. 137)

JURISDICTION.

1. The jurisdiction of this court to review the judgment below is expressly provided for by Judicial Code, Section 240, as amended by the Act of February 13, 1925. This cause originated in the United States District Court for the Southern District of Iowa, and a judgment adverse to petitioners was affirmed by the United States Circuit Court of Appeals for the Eighth Circuit.

2. The date of the judgment sought to be reviewed is October 27, 1947.

THE QUESTIONS PRESENTED.

The questions presented by the decision below may be summarized as follows:

1. Under the Federal Employers' Liability Act, is a railway company required to maintain a station platform, upon which trainmen alight from trains in the performance of their duties, in safer condition than for general and ordinary uses such as walking, trucking, and other depot purposes?

2. In view of respondent's repeated testimony that he was "jerked" from the car by the movement of the train,

could the jury properly find that the depot platform was the proximate cause of respondent's fall and injury?

3. Was the Circuit Court of Appeals for the Eighth Circuit justified in ruling, as a matter of law, that the evidence was legally sufficient to support a finding that respondent's injuries were the proximate result of actionable negligence on the part of petitioners?

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT.

1. The Circuit Court of Appeals for the Eighth Circuit has decided an important question of Federal law arising under the Federal Employers' Liability Act in a manner directly in conflict with the applicable decisions of this court. The decision of the Circuit Court of Appeals for the Eighth Circuit in this case rendered petitioners insurers of the safety of employees who have occasion to alight from trains upon a station platform, for the opinion inferentially concedes that the station platform was not in a condition which would have justified a finding of negligence as to the general public.

2. The Circuit Court of Appeals for the Eighth Circuit has decided an important question of Federal law arising under the Federal Employers' Liability Act in a manner contrary to the prior decisions of this court in that it holds that although respondent repeatedly testified that he was "jerked" from the car by the lurching of the train, the alleged defect in the station platform may be by the jury found to be a proximate cause of respondent's injuries.

3. The Circuit Court of Appeals for the Eighth Circuit, in holding that jury issues as to negligence and proximate cause are presented by the record in this case, has rendered a decision upon an important question of Federal law arising under the Federal Employers' Liability Act directly in conflict with the decisions of other Circuit

Courts of Appeal, and with long-established principles governing actions instituted under the Federal Employers' liability Act.

A certified copy of the record in said suit in United States Circuit Court of Appeals for the Eighth Circuit, including the record, proceedings, opinion, and disposition of the cause had in said court, is herewith furnished and lodged in the office of the Clerk of this Court in compliance with Rule 38 of the rules of this Court.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this court, directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding that court to certify and send to this Court for its review and determination a full and complete transcript of the record and all of the proceedings had in the case numbered and entitled on its docket as "No. 13562—Civil, Joseph B. Fleming and Aaron Colnon, as Trustees of the Estate of The Chicago, Rock Island and Pacific Railway Company, Appellants, vs. Everett E. Husted, Appellee;" and that the said opinion and judgment of the United States Circuit Court of Appeals for the Eighth Circuit may be reversed by this Court and remanded for further proceedings, and that petitioners have such other and further relief in the premises as to this Court may seem meet and just.

JOSEPH B. FLEMING AND AARON COLNON, AS TRUSTEES OF THE ESTATE OF THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,

By Ralph L. Read,
Alden B. Howland,
Des Moines, Iowa,
Attorneys for Petitioners.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

SUMMARY OF ARGUMENT.

I.

Under the Federal Employers' Liability Act, there must be a showing of actionable negligence on the part of defendant amounting to more than a mere scintilla before a cause may properly be submitted to the jury. In the case at bar, the evidence was insufficient to justify a finding that petitioners violated any duty which they owed to respondent. The Circuit Court of Appeals for the Eighth Circuit should, therefore, have reversed the case on the ground that there was no showing of actionable negligence.

Brady v. Southern Ry. Co., 320 U.S. 476, 88 L. Ed. 239.
Ellis v. Union Pacific R.R. Co., 91 L. Ed. (Adv. Sheets) 433 (decided Feb. 3, 1947).
Nelson v. Southern Ry. Co., 246 U.S. 253, 62 L. Ed. 699.
D.L. & W. R.R. Co. v. Koske, 279 U.S. 7, 73 L. Ed. 578.
Mo.-Pacific R.R. Co. v. Aeby, 275 U.S. 426, 72 L. Ed. 351.
McGivern v. Northern Pacific Ry. Co., 132 Fed. (2d) 213, (C.C.A. 8th).
Sullivan v. C. & N.W. Ry. Co., 258 N.W. 38 (Neb.).
Peters v. Tennessee Central Ry., Inc., 167 S. W. (2d) 973 (Tenn.).
Raudenbush v. Baltimore & Ohio R.R. Co., 63 Fed. Supp. 329.

II.

In order to justify a finding that a particular act or omission is the proximate cause of an injury, it must af-

firmatively appear that the injury is the natural and probable consequence of the wrongful act or omission, and that injury therefrom ought to have been foreseen in the light of all the attending circumstances.

Brady v. Southern Ry. Co., 320 U.S. 476, 88 L. Ed. 239.

Ellis v. Union Pacific R.R. Co., 91 L. Ed. (Adv. Sheets) 433 (decided Feb. 3, 1947).

ARGUMENT.

I.

Upon the trial of this cause, petitioners, by motions for an instructed verdict, made at the close of respondent's evidence and renewed at the close of all the evidence, and by motion for new trial after verdict, challenged the sufficiency of the evidence to show actionable negligence on their part. The trial court held the evidence sufficient to show actionable negligence with respect to the condition of the Van Meter depot platform, and this ruling was upheld by the Eighth Circuit Court of Appeals in an opinion in which, inferentially at least, it is conceded that no defect or insufficiency in the station platform existed, which would have made it unsafe for the usual and ordinary uses of such a facility, but that the condition of the platform justified a finding of negligence in favor of respondent because he was permitted, in the performance of his duty as a freight train brakeman, to alight upon such platform. In other words, the Eighth Circuit Court of Appeals holds that while a depot platform may be entirely safe and adequate for the uses for which such platform was primarily designed, nevertheless one for whose primary benefit and use the platform was not erected is entitled to demand, with respect to the maintenance of same, a greater degree of care than the classes of persons for

whose use and benefit the same was initially provided.

Both respondent and petitioners introduced in evidence photographs of the Van Meter station platform, which, they concede, correctly disclose the condition of the same when respondent claims to have been injured on June 23, 1943. These photographs disclose no substantial conflict and are mutually complementary in that some of them show portions of the platform not disclosed by the photographs introduced by the other party. It was undisputed that the concrete curb at the northerly edge of the station platform next to the track was broken in places and was in some places unevenly displaced toward the southerly rail of the track upon which the train was moving. Where the curb was displaced, the distance between the southerly rail and the northerly edge of the curb was 25¼ inches, and where the curb was upright, the distance was 28 inches. There was no showing that the displaced curb was any higher than the other portions thereof. It was conceded, also, and shown without dispute that box cars extend approximately 27½ inches beyond the outer edge of the rail upon which they are standing or moving. It is, therefore, established without dispute that where the curb was displaced toward the rail, its northerly edge was under the overhanging portion of the freight car, and that where the curb was upright, the outer edge of the box car was approximately even with the curb.

Respondent testified that when the speed of the train had been reduced to about two miles per hour, he placed his weight on his hands, and was about to jump from the car onto the platform when a severe lurch or jerk of the train occurred. This threw him out and he lost control of his movements. As he fell, he claims to have caught his foot in the broken portion of the curb. It is upon these facts, and no others, that the rulings below were predicated.

Respondent's fall occurred upon a clear warm day in midsummer. In reporting his alleged injury, respondent repeatedly stated that he jumped from the box car to the station platform, slipped on the bricks, and fell. It may be conceded, of course, that the jury was entitled to believe respondent's story as told on the witness stand, and to reject his account as reported to his employer on numerous occasions immediately following the occurrence. But if this be conceded, the question remains whether the record contains evidence of actionable negligence on the part of petitioners as to respondent sufficient to sustain an award of damages.

In this case, respondent was not required, as in many of the cases which have come to this Court, to perform his work under inherently hazardous conditions. Neither is there any claim that respondent was compelled to alight from the train before it came to a stop. Respondent's fall, under the rulings of the two courts below, was clearly occasioned by his own act, coupled with the alleged lurching or surging of the train which, it was conceded, did not constitute an independent ground of negligence. Respondent was placed in no position of hazard other than that inherent in working as the member of a crew of a moving train. In this respect, the case is clearly distinguishable from all of the cases cited in the opinion of the Eighth Circuit Court of Appeals.

This Court, as presently constituted, has repeatedly said that in cases arising under the Federal Employers' Liability Act, a liability is imposed only when the employer has been negligent, and that the employer is in no sense an insurer of his employee's safety. Thus, in *Brady v. Southern Ry. Co.*, 320 U.S. 476, 88 L. Ed. 239, this Court, speaking by Mr. Justice Reed, said:

> "The weight of the evidence under the Federal Employer's Liability Act must be more than a scintilla

> before the case may be properly left to the discretion of the trier of fact—in this case, the jury. (Citing cases) When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit, directed verdict, or otherwise, in accordance with the applicable practice, without submission to the jury, or by judgment notwithstanding the verdict."

In *Ellis v. Union Pacific Ry. Co.*, 91 L. Ed. 433 (decided February 3, 1947), you said:

> "The Act does not make the employer the insurer of the safety of his employees while they are on duty. The basis of his liability is his negligence, not the fact that injuries occur and that negligence must be 'in whole or in part' the cause of the injury."

The facts in this case are fairly comparable with those disclosed in *Nelson v. Southern Ry. Co.*, 246 U.S. 253, 62 L. Ed. 699, in which the opinion of this court was delivered by Mr. Justice Brandeis, considered as one of the greatest liberals who has occupied a position upon this Court. There, the employee, a civil engineer, was making a survey in a railroad yard. In doing so, he walked along the main track and stepped upon a tie, a small piece of which was decayed to the extent that it slivered off under his weight, and he fell to the ground and sustained a knee injury. Upon such facts, Mr. Justice Brandeis, speaking for this Court, said:

> "Upon these facts Nelson sought in a state court of North Carolina to recover damages from the railway under the Federal Employers' Liability Act. The trial court refused defendant's motion for a nonsuit, and the jury rendered a verdict for plaintiff. Judgment thereon was reversed by the Supreme Court of the state on the ground that there was no evidence of negligence; and the case came here on writ of error.

It is clear that the defendant did not fail in any duty which it owed to the plaintiff.

Judgment affirmed."

The station platform at Van Meter, Iowa, was not built primarily to provide petitioners' trainmen with a surface upon which they might jump from moving trains. It was constructed to facilitate the transportation of passengers and freight and to provide passengers with a facility to serve them. While the Eighth Circuit Court of Appeals, in its opinion, holds that it does not determine whether the platform was sufficient for all usual purposes, it does say that even if perfectly sufficient and safe as a depot facility, that, nevertheless, petitioners might be found guilty of actionable negligence because respondent was permitted to alight on the station platform in the performance of his work as a freight train brakeman. We submit that the logic of the Circuit Court of Appeals cannot be sound. Respondent, in his evidence, conceded that he was used to alighting on all types and kinds of surfaces in the performance of his work. The presence of the depot platform, itself, certainly presented no hazard to respondent, and certainly did not increase the danger of his injury. How, then, can it be said that the failure to maintain the curb of the station platform in perfect alignment constituted actionable negligence as to Everett E. Husted?

To hold, as did the Circuit Court of Appeals, that petitioners are under a greater measure of care with respect to the condition of station platforms because trainmen are permitted to alight thereon than would apply in the case of a member of the general public, finds no support in the prior pronouncements of this or any other court. The doctrine that a railway employee under the Federal Employers' Liability Act is entitled to exact a higher standard of maintenance than would the persons for whose

primary use and benefit a particular facility was constructed, is, indeed, novel, and cannot stand logical analysis. Such a rule merely makes of petitioners and other employers under the Federal Act, insurers of the safety of their employees, a duty which this Court has repeatedly said that the Federal Act does not impose.

It must be borne in mind, also, that the point at which the broken curb was located was directly beneath the outer edge of the box car in which respondent was riding. A brakeman alighting from a freight train would ordinarily step or jump completely over the curb and alight upon a portion of the platform a considerable distance beyond the curb, itself. This is exactly what petitioners' station agent, who testified as a witness, says actually occurred. (See R. 89) To hold that petitioners may be found by a jury to have been guilty of actionable negligence for failure to keep in perfect repair a portion of the platform curb with which no one would ordinarily have any occasion whatever to come in contact, again demonstrates that what the Circuit Court of Appeals for the Eighth Circuit has done is merely to hold that petitioners, at the whim of a jury, may be constituted the insurers of the safety of their employees. This, we again point out, is directly contrary to the prior pronouncements of this court in very recent months.

Unless employers under the Federal Act are to be constituted as the insurers of the safety of their employees, unless the Federal Act may be converted from a law dealing with liability for common law negligence and fault into a workmen's compensation measure, we submit that the decision of the Circuit Court of Appeals in this case is wrong, that it is contrary to the prior pronouncements of this court, and that that court has so far departed from the customary and accepted rules of law governing such matters that this Court should exercise its broad super-

visory powers for the correction of a manifest error in the administration of the statute. In the very nature of things, injuries will, and are being sustained by railway employees where neither party can be said to be at fault. In other instances, employees do, and will suffer injury from the result of their own actions. In such cases, this Court has consistently held that, under the law, as written, there can be no recovery of damages. We believe that this case is a perfect illustration of an injury suffered by a railway employee solely through his own acts and without the intervention of any actionable negligence on the part of his employer. To adopt the tenuous theory of the Eighth Circuit Court of Appeals, as disclosed in the opinion below, violates the rule which this Court has laid down and uniformly followed. This Court, we recognize, has been liberal in the application of the Federal Act to railroad employee injury cases. We submit, however, that this Court has neither made nor intended to make, the Federal Act into a workmen's compensation statute. Viewed in this light, we believe that the decision of the Eighth Circuit Court of Appeals is manifestly erroneous, and should be reversed.

II.

Respondent testified that as he was preparing to jump from the box car in which he was riding and while he had the weight of his body upon his hands, resting upon the floor of the car, a surge or jerk occurred, which threw him from the car to the station platform. He testified that as he fell, his foot caught in the platform curb. He, of course, would have fallen, irrespective of the condition of the curb. He repeatedly says that he was "jerked out" of the box car in which he was riding by the lurching of the train. Under these circumstances, it seems to us quite clear that the lurching or surging of the train

was the direct and proximate cause of respondent's fall. It was the fall which respondent claimed produced the injuries for which he was awarded damages.

The Eighth Circuit Court of Appeals held, under these facts, that a jury might find that the condition of the curb was a proximate cause of respondent's injury, merely because under the statute negligence "in whole or in part" is made the basis of recovery by the Act. The floor of the box car was approximately four feet above the station platform. Respondent testified that he was "jerked out of the car." If so, he must have completely lost control over his movements and would have fallen upon the station platform irrespective of the broken condition of the platform curb.

Viewed in a slightly different light, it appears quite clear that the direct cause of respondent's fall was the jerking or lurching of the train. The jerking of the train, under respondent's evidence, was the cause which produced the fall, and it is not claimed that but for the broken condition of the curb, the fall would not have occurred. Respondent's counsel conceded, and the trial court ruled, that the jerking of the train did not constitute actionable negligence. Accordingly, it was withdrawn from the jury as a ground of recovery. Here, respondent did not testify to any facts whatever from which the jury might conclude that the severity of his fall was increased by, or that his injury would not have occurred but for, the broken condition of the platform. We say, therefore, that under this record the jury could not find that the broken condition of the platform curb was a proximate cause of the injuries. The injuries, if respondent sustained them, were produced by the fall, and the fall was directly caused when, as respondent, himself, says, he was "jerked out of the car." It seems clear, therefore, that in this respect, no jury issue was presented and that the Circuit Court of Ap-

peals has erred in affirming the judgment of the trial court.

The Eighth Circuit Court of Appeals has, we submit, wholly disregarded fundamental principles of law governing the liability of employers under the Federal Employers' Liability Act. Indeed, if it may be said that actionable negligence as to respondent is disclosed by the record in this case, it is difficult to conceive of any factual situation under which it might properly be said that a railway employer is entitled to an instructed verdict on the ground that no negligence is disclosed.

Manifestly, the depot platform was not constructed for the use or benefit of respondent. Had there been no platform at all at the point in question, petitioners would have been guilty of no actionable negligence. It cannot well be contended that the presence of the platform increased the hazard of respondent's employment. How, then, can it be said that petitioners violated any duty which they owed to respondent to provide him a reasonably safe place in which to perform his work?

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers over the judgments of Circuit Courts of Appeal. In order that the errors committed by the Eighth Circuit Court of Appeals may be corrected, and that petitioners may have the benefit of the rights to which they are entitled under the Federal Employers' Liability Act, a writ of certiorari should be granted; this Court should review the decision of the Eighth Circuit Court of Appeals and finally reverse it.

Respectfully submitted,

RALPH L. READ,

ALDEN B. HOWLAND,

Attorneys for Petitioners.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A.D., 1947.

No. 548

JOSEPH B. FLEMING AND AARON COLNON, AS TRUSTEES OF THE ESTATE OF THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, A CORPORATION, *Petitioner,*

vs.

EVERETT E. HUSTED, *Respondent.*

BRIEF IN OPPOSITION OF RESPONDENT

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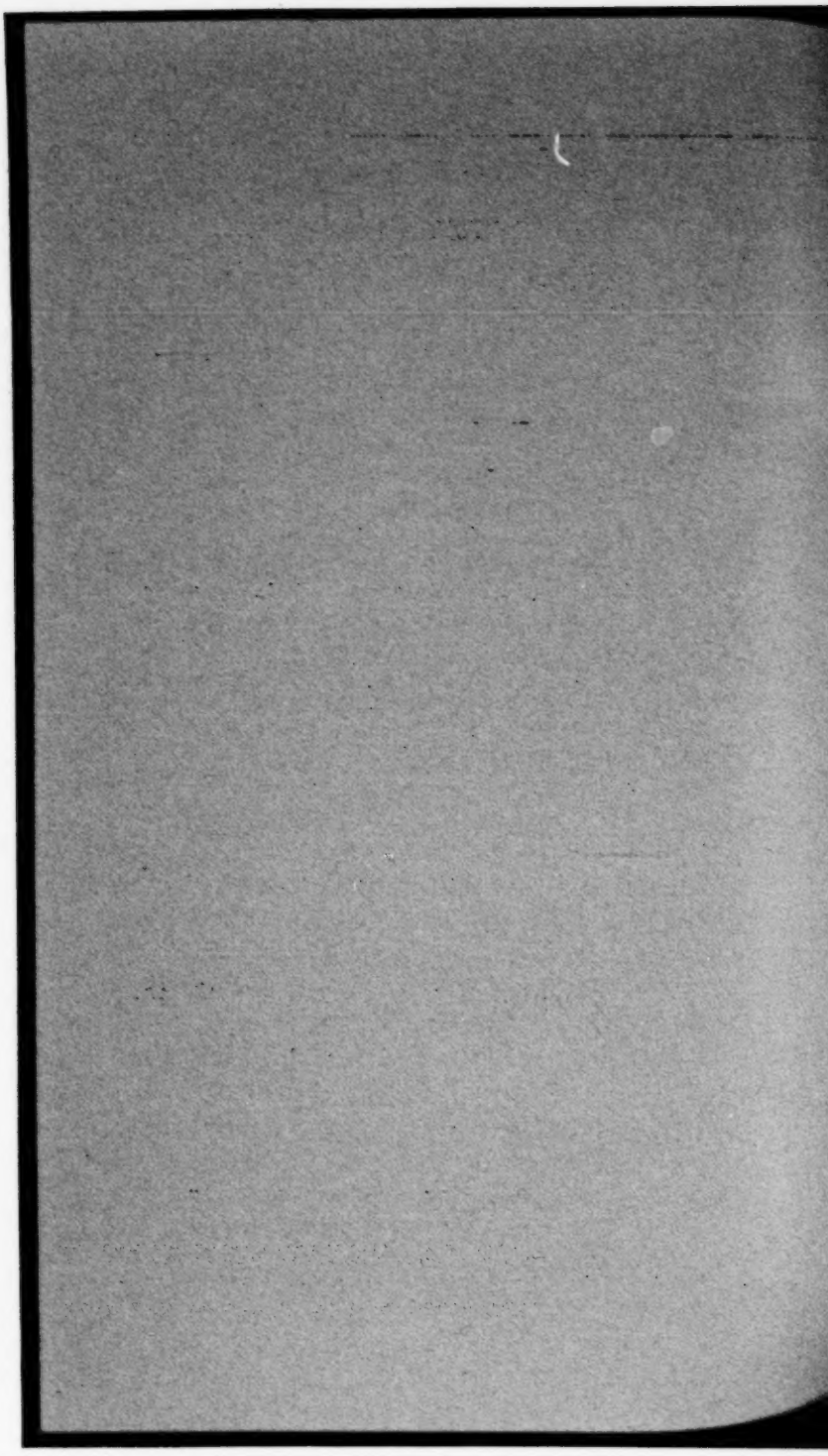

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IN THE

Supreme Court of the United States

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No. .....

JOSEPH B. FLEMING AND AARON COLNON, AS TRUSTEES OF THE ESTATE OF THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, A CORPORATION, *Petitioner,*

vs.

EVERETT E. HUSTED, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

OPINIONS BELOW

The District Court rendered no opinion. The opinion of the Circuit Court of Appeals, Eighth Circut, (R. 134 to 143) is reported in 164. Fed. (2d) pg. 65.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on October 27, 1947. (R. 143-144). No Petition for Rehearing was filed in the Circuit Court. Mandate was issued out of said Circuit Court of Appeals in said cause to the United States District Court for the Southern District of Iowa, on the 14th day of November, A.D., 1947. Said Mandate has never been recalled, superseded or stayed. (R. 145). The jurisdiction of this Court is invoked under

Section 240 of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Is a railway company required under the act involved, to maintain a station platform, upon which trainmen alight from trains in the performance of their duties, in safer condition than for general and ordinary uses such as walking, trucking and other depot purposes?

2. Whether the jury could properly find that the depot platform was the proximate cause of Respondents fall and injury?

3. Were Respondent's injuries the proximate result of actionable negligence on the part of Petitioners and was the Circut Court justified in so ruling as a matter of law?

STATUTE INVOLVED

> Section 1. "Every common carrier by railroad while engaging in commerce between any of the several states * * shall be liable in damages to any person sufering injury while he is employed by such carrier in such commerce * * for such injury * * resulting in whole or in part, from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment." (Act of April 22, 1908, 35 Statutes at Large 65, U.S.C.A., Title 45, Secs. 51-58).

By the 1939 Amendment, assumption of risk as a defense was eliminated by Congress.

The 1939 Amendment to the Federal Employer's Liability Act, 45 U.S.C.A. 54, provides that an

> "Employee shall not be held to have assumed the risks of his employment in any case where such

injury or death resulted in whole or in part, from the negligence of any of the officers, agents, or employees of such carrier."

STATEMENT

This is a personal injury action to recover damages under the Federal Employer's Liability Act. Trial to a jury resulted in a verdict for Respondent. Upon appeal, the Eighth Circut Court affirmed. 164 Fed. (2d) 65, (R. 133-143). By complaint, Husted alleged that the railway company maintained certain railway yards, tracks, and a station platform extending into and through the Station of Van Meter, in the State of Iowa (R. 3). He further alleged that it was the duty of the Defendant to use reasonable care to keep the station platform in a reasonably safe condition (R. 3), but that the Defendant failed in its duty in that regard in that it allowed the platform "to be in a defective, dangerous, and uneven condition, and allowed depressions to remain therein, and allowed the same to be, and it was, in such condition as to render it dangerous and unsafe for railway employees obliged to alight from moving cars on said platform". (R. 3).

The complaint further alleged that while Plaintiff was acting within the scope and course of his employment, he attempted to alight from a slowly moving car going about two miles an hour and that because of the negligence of the Appellants in the maintenance of the platform, he sustained severe personal injuries.

Husted alleged that he was injured while engaged in interstate commerce.

The answer admitted interstate commerce (R. 6). It further alleged that the accident was caused solely by Plaintiff's negligence (R. 7). The answer further denied that the platform in question was "in a defective, dangerous or negligent condition" and denied that "defendants allowed

depressions to remain therein" and it "was unsafe for railway employees" (R. 7).

Everett E. Husted, the Appellee, was 51 years of age at the time of the trial. For some 23 years he worked for the Appellant Railway Company (Trustees) as a railway freight brakeman. On June 23, 1943, Husted met with injuries for which this action is brought.

The train in question left the station of East Des Moines that morning, pulling about ten or eleven cars.

Leaving Booneville Husted rode in the head car next to the engine. The next station was Van Meter where the accident occurred. It was Husted's intention to get out at the depot at Van Meter. He had been instructed by his conductor, Burns, "about getting the switch list at Van Meter, and find out what work there was to do in switching and spotting cars and setting out" (R. 13).

As the train was coming into Van Meter, it slowed down to probably about 2 miles an hour. It was a warm day. Husted sat down on the edge of the door of the box car with his hands on the floor of the car and his feet hanging down below the car, that is, at the side of the car (R. 13). He illustrated his position to the jury saying: "I got down like this to get off, with my feet hanging down, and the train was down to about two miles an hour, and there was an awful surge of the train, which threw me out, and I caught my foot in a crack in the curb there, and slipped with my foot and it threw me and I lit on my left shoulder and side on the platform" (R. 13).

He further testified: "I caught my foot in the curbing" (R. 13). He said there was a crack in the curbing, which was about an inch and a half or two inches deep, and that the curb was six or seven inches wide (R. 13).

It might be stated at this point that while Husted testified there was an awful surge or jerk of the train, and

while probably there was sufficient evidence of such surge and jerk of the train to raise a question of fact for the jury as to negligence on this phase of the case, the Appellee, in the interest of caution and safety and desiring to avoid any possible error, requested that the Court submit to the jury but one issue of negligence—that of the defective platform. This was done (R. 76).

The record (Exhibit A-15) details the position of the platform and curbing (See Exhibit B-17). The record does not disclose any markings on the exhibit to indicate just where Husted fell. However, the spot was POINTED OUT TO THE JURY. Husted testified: "I caught my foot in a crack in the curb" (R. 13).

On page 18 of the record the following appears: "Referring to Exhibit 'B' my foot was caught RIGHT HERE in the curbing (indicating a point on Exhibit 'B' where there appears to be a break in the curbing)."

Exhibit B is found on Page 17 of the record. It appears that the curbing at this point had broken away from the main portion of the platform, as is clearly evidenced by the photograph Exhibit B. This was pointed out to the jury as the point of the injury. Husted testified: "My foot was caught right here in the curbing" (R. 18).

Husted testified that before he attempted to alight there was an awful jerk (R. 13). Defendant's conductor testified that he did not remember any lurching or jerking of the train, but upon cross-examination said: "It is not unusual for there to be some jerk in freight trains coming into stations in making a stop" (R. 82).

As to the point of the accident attention is called to Defendants' (Appellants') Exhibit 7 (R. 37). In this picture a man is shown standing opposite one of the large breaks in the curbing, which also appears on Plaintiff's Exhibit B, and which Plaintiff indicated in his testimony

(R. 18) as the place where "my foot was caught right here in the curbing" (R. 18).

On the back of Appellants' Exhibit 7 it is stated that the photograph is a "view to east showing station platform with man standing on track opposite approximate point of accident" (R. 39).

An examination of the Exhibit (R. 37) shows the man standing approximately opposite the break in the curbing, which was indicated by Husted on Exhibit B (R. 18).

To summarize Husted's testimony, it is to this effect: While he was riding in the doorway of a box car coming into Van Meter with the train going about 2 miles an hour and as he was preparing to alight, there was a jerk of the train and he fell from the car, caught his foot in the broken curb and slipped and was injured (R. 13). There was no question about the break in the curb and no question but that it had existed for many years. The accident happened on June 23, 1943. At the time of the trial in March, 1947, the breaks in the curb had not been fixed (R. 90).

ARGUMENT

The questions seem to be (1) was Defendant negligent in the maintenance of the platform in question, and (2) was the negligence of the Defendant "in whole or in part", a proximate cause of Plaintiff's injury.

Since there is no question of assumption of risk in view of the 1939 Amendment to the Employer's Liability Act, and since contributory negligence, if any, may only be considered in litigation of damages, consideration of these latter questions are herein pretermitted.

THE MODERN RULE AS TO THE FUNCTION OF A JURY

The new District Court rules provide:

> "(A) RIGHT PRESERVED, The right of trial by jury as declared by the Seventh Amendment to the Constiution or as given by a statute of the United States shall be preserved to the parties involate."
> (Rule 38. Rules of Civil Procedure for the District Courts of the United States.)

The Supreme Court of the United States has very definitely and clearly returned to the basic and fundamental concept entertained by the founders of our Country, to-wit: that fact questions should be determined by a jury. We quote the language of Mr. Justice Murphy, in speaking for that Court.

> "The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment. A right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts."
> Jacob v. City of New York, 62 S. Ct. 854, 315 U.S. 752, 86 L. ed. 1166.

Mr. Justice Murphy did not enunciate for the Supreme Court of the United States any new or startling rule. He merely got back to basic principles. In an early day Mr. Justice Hunt, speaking for the Supreme Court of the United States first spoke of cases where the facts were undisputed and where a court might hold as a matter of law there was no negligence. He also spoke of cases where the facts were undisputed and the Court might be obliged to hold there was negligence, as a matter of law.

Then the Justice spoke of cases in the range between the two extremes before mentioned, using this language—just as appropriate in 1946 as it was in 1874:

"Certain facts we may suppose to be clearly established from which one sensible, impartial man would infer that proper care had not been used, and that negligence existed; another man equally sensible and equally impartial would infer that proper care had been used, and that there was no negligence. It is this class of cases and those akin to it that the law commits to the decision of a jury. Twelve men of the average community, comprising men of education and men of little education, men of learning and men whose learning consists only in what they have themselves seen and heard, the merchant, the mechanic, the farmer, the laborer; these sit together, consult, apply their separate experience of the affairs of life to the facts proven, and draw a unanimous conclusion. This average judgment thus given it is the great effort of the law to obtain. It is assumed that twelve men know more of the common affairs of life than does one man; that they can draw wiser and saner conclusions from admitted facts thus occurring, than can a single judge."

CASES UNDER THE FEDERAL EMPLOYERS' LIABILITY LAW.

On May 24, 1943, the case of *Bailey v. Central Vermont Ry.* 319 U.S. 350, 63 S. Ct. 1062, 87 L. ed. 1444, was decided by the Supreme Court of the United States, the opinion being written by Mr. Justice Douglas. We quote from the opinion:

"The right to trial by jury is 'a basic and fundamental feature of our system of federal jurisprudence." Jacob v. New York City, 315 U.S. 752, 62 S. Ct. 854, 86 L. ed. 1166. IT IS PART AND PARCEL OF THE REMEDY AFFORDED RAILROAD WORKERS UNDER THE EMPLOYERS' LIABILITY ACT. REASONABLE CARE and CAUSE and EFFECT are as elusive here as in other fields. BUT THE JURY HAS BEEN CHOSEN AS THE APPROPRIATE TRIBUNAL TO APPLY THOSE STANDARDS TO THE FACTS OF THESE PERSONAL INJURIES. That method of determining the liability of the carriers and of placing on them the cost of these industrial accidents may be crude,

> archaic, and expensive as compared with the more modern systems of workmen's compensation. But however inefficient and backward it may be, it is the system which Congress has provided. TO DEPRIVE THESE WORKERS OF THE BENEFIT OF A JURY TRIAL IN CLOSE OR DOUBTFUL CASES IS TO TAKE AWAY A GOODLY PORTION OF THE RELIEF WHICH CONGRESS HAS AFFORDED THEM."

The language of this case is particulary significant. This is the only case in which it has been said, so far as the writer of this brief is aware, that the right to trial by jury "IS PART AND PARCEL OF THE REMEDY AFFORDED RAILROAD WORKERS UNDER THE EMPLOYERS' LIABILITY ACT".

And it is to be noted that the Court says that to deprive the workers of a jury trial in doubtful cases would "TAKE AWAY A GOODLY PORTION OF THE RELIEF WHICH CONGRESS HAS AFFORDED THEM".

We will not take the time to quote from the cases, but the Supreme Court of the United States has held that close cases as well as others should be submitted to the jury. The situation may have been different ten years ago, but such is the law today.

THE CLOSE CASES

The rule is definite and clear that IN CLOSE OR DOUBTFUL CASES the issue of negligence should be submitted to a jury.

Jacob v. City of N.Y., 315 U.S. 752, 62 S. Ct. 854, 86 L. ed. 1166

Bailey v. Vermont Central Ry., 319 U.S. 350, 63 S. Ct. 1062, 86 L. ed. 1444

Tiller v. At. Coast Line, 318 U.S. 54, 63 S. Ct. 444, 87 L. ed. 610

Tennant v. P. & P. Union Ry. Co., 321 U.S. 29, 64 S. Ct. 409, 88 L. ed. 520

Owens v. U. P., 319 U.S. 715, 63 S. Ct. 1271, 87 L. ed. 1683
Blair v. B. & O., 65 S. Ct. 545, 323 U.S. 600, 89 L. ed. 490
Lavender v. Kurn, 66 S. Ct. 750,
Myers v. Reading Co., 67 S. Ct. 1334 (Dec. June 2, 1947)
Jesionowski v. Boston & Main Rd., 91 U.S. L. ed. 355 (Dec. Jan. 13, 1947).

If a jury issue existed in such cases as those above cited, particularly the Lavender v. Kurn case, there is no question but that a jury issue exists in the case at bar.

NO ASSUMPTION OF RISK

While the statute has done away with the defense of assumption of risk, railway companies have kept continually pecking away at the statute and have been trying to weaken and "lessen the significance of plain words". The Supreme Court of the United States has definitely spoken in this matter. It has said that such cases are for the jury.

In the often-quoted cases of Tiller v. Atlantic Coast Line, 63 S. Ct. 444, 318 U.S. 54, 87 L. ed. 610, Mr. Justice Black wrote the opinion, in which he quoted from the older case of Jones v. East Tennessee, etc. R. Co., 128 U.S. 443, 9 S. Ct. 118, 72 L. ed. 478.

Mr. Justice Black said:

> "No case is to be withheld from a jury on any theory of assumption of risk and QUESTIONS OF NEGLIGENCE SHOULD UNDER PROPER CHARGE FROM THE COURT BE SUBMITTED TO THE JURY FOR THEIR DETERMINATION. Many years ago this court said of the problems of negligence, "WE SEE NO REASON, SO LONG AS THE JURY SYSTEM IS THE LAW OF THE LAND, AND THE JURY IS MADE THE TRIBUNAL TO DECIDE DISPUTED QUESTIONS OF FACT, WHY IT SHOULD NOT DECIDE SUCH QUESTIONS AS THESE AS WELL AS OTHERS'. Jones v. East Tennessee, etc. R. Co. 128 U.S. 443, 445, 9 S. Ct. 118,

32 L. Ed. 478. Or as we have put it on another occasion: 'Where the facts are in dispute, and the evidence in relation to them is that from which fair-minded men may draw different inferences, 'the cases should go to the jury."

Citation of cases involving similar facts cannot be of particular aid to the court. But the very early case of Bennett v. Louisville and Nashville R.R.Co. 12 Otto 577, 26 L. ed. 235, is interesting. It appeared that plaintiff's decedent stepped into a hole in the floor of a depot platform. The court held that a question was presented for a jury as to the negligence of the Company. To be true, this was a DEEPER hole and a more extreme case than the case at bar. The rule of law, however, is the same whether the depression be an eighth of an inch or eight feet. The Supreme Court in this early case held the question of negligence to be for the jury.

The basic question was: Did the defendant exercise reasonable care in the premises? Whether such reasonable care was exercised was a jury question under this early case and is a jury question under the recent cases.

In the case of Texas & P. R. Co. v. Stewart, 228 U.S. 357, 57 L. ed. 875, it appeared that a lady got upon a wrong train; that when she discovered this fact, she attempted to alight; that the illumination was deficient and she was injured.

The Court said that a railroad company was bound to use ordinary care to light its stations and approaches. By the same token a railway company is bound to use ordinary care to keep its platform in a reasonably safe condition and whether or not the condition in which it existed constituted ordinary care is a question for the jury.

FEDERAL STATUTE APPLIES TO DEPOT PLATFORM

> "The act makes the carrier liable for injuries resulting to its employes by reason of any defect or insufficiency due to its negligence in 'its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment'. The language is broad and includes things and places furnished by the carriers to be used by their employees in the performance of their work. The platform was intended to be and was used by respondent to do station work. Having regard to the beneficient purposes of the act, it would be unreasonable to hold that, when so used, a station platform is not covered by the word 'works' in the above-quoted provision. The Supreme Court rightly held that the clause applied."
>
> Missouri Pac. R. Co. v. Aeby, 48 S. Ct. 177, 275 U.S. 426, 72 L. ed. 351.

While the above case was reversed on another point, the above quotation is clearly pertinent in the above case.

The court further said:

> "This case is governed by the act and the applicable principles of common law as established and applied in federal courts. There is no liability in the absence of negligence on the part of the carrier. Seaboard Air Line v. Horton, 233 U.S. 492, 501, 34 S. Ct. 635, 58 L. ed. 1062, L.R.A. 1915 C, 1 Ann. cas. 1918B, 475, New York Central R. R. Co. v. Winfield, 244 U.S. 147, 150, 37 S. Ct. 546, 61 L. ed. 1045, L.R.A. 1918C, 439, Ann. Cas. 1917D, 1139. Its duty in respect of the platform did not make petitioner an insurer of respondent's safety; there was no guaranty that the place would be reasonably safe. The measure of duty in such cases is reasonable care, having regard to the circumstances."

Again the court in this case said:

> "The obligation in respect of station platforms and the like owed by carriers to their passengers or to others coming upon their premises for the transaction of business is greater than that due their employees accustomed to work thereon. The reason is that the latter, famiilar with the situation, are deemed voluntarily to take the risk of known conditions and dangers."

Relative to the last above quoted statement as to the difference between the duties to passengers and employees, the rule is now changed.

In view of the 1939 Amendment to the Act doing away with assumption of risk "the reasons" for the difference between the duty to passengers and employees no longer exists.

In fact under the statute the carrier is liable to an employee, if its negligence "IN WHOLE OR IN PART" is a proximate cause of the injury.

PROXIMATE CAUSE

It is to be noted that under the Federal Statute the negligent act of the carrier need not be the sole proximate cause of the injury. It is sufficient if be A proximate cause.

> *Davis v. Wolfe*, 263 U.S. 239, 68 L. ed. 285 44 S. Ct. 64.

All that is required is the setting of probative facts "capable of supporting, with reason, the conclusion expressed in the verdict."

> *Myers v. Reading Company*, 67 S. Ct. 1334 (Dec. Jan. 13, 1947).

A further expression from the same opinion has application here.

> "Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable."

In passing it might be said that the facts in both *Myers v. Reading Company* and *Lavender v. Kurn*, were not as

favorable to the injured employee as those evidenced by the record in favor of Respondent.

Missouri Pacific v. Aeby, 48 S. Ct. 177, 275 US. 426, 72 L. ed. 351, specifically held that a depot platform would come within the definition of the word "works" as used in the Federal Employer's Liability Act.

CONCLUSION

It is apparent that the decision of the Eighth Circuit is not in conflict with the applicable decisions of this Court and contrary to the decisions of this Court. Nor is the decision in conflict with the decisions of other Circuits in holding that jury issues as to negligence and proximate cause are presented by the record in this case.

There is nothing new, novel or unusual about the case, except the moderate size of the verdict returned. It is suggested that in the light of the record here made, the well established and controlling rules of law which prevail, coupled with the fact that the mandate has issued, and may rightfully be enforced at any time, rendering the questions raised moot and abstract, that the petition for the writ should be denied.

Respectfully submitted,

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